

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of BellSouth Telecommunications, Inc.)	
For Forbearance Under 47 U.S.C. § 160(c) From)	WC Docket No. 04-405
Application of <i>Computer Inquiry</i> and Title II)	
Common-Carriage Requirements)	

COMMENTS

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and
KYISPA

By their Secretary:

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COMMENTS OF SOUTHEAST TELEPHONE, INC.

Pursuant to the Federal Communication Commission’s (“Commission”)’s November 3, 2004 Public Notice (DA 04-3507), Southeast Telephone, Inc. (“SouthEast”) and Kentucky Internet Service Providers Association (KYISPA) submits these Comments on the Petition for Forbearance Filed By BellSouth Telecommunications, Inc. Regarding Incumbent LEC Provision of Broadband. If granted, this Petition could potentially usher in a monopolistic environment with DSL being offered only by the RBOCs in their respective territories with the Cable companies as the only competitive provider. With no *Computer Inquiry* safeguards and Common Carrier requirements, how long will the ISPs survive in this “Clash of the Titans?” The ultimate loser in the granting of BellSouth’s “Pie in the Sky” request would be the consumers, who would suffer the rise in prices brought about by the lack of competition within the DSL arena.

Introduction and Background

Since the inception of the enhanced services market in the 1960’s, the Commission has been concerned about the competitive advantage the RBOCs have over

their ISP competitors. The *Computer Inquiries* conducted between 1966 and 1999 sets out the FCC's policies regarding the competition between ISPs and telephone companies seeking to enter the ISP market. *Computer I* and *Computer II* set forth the classifications of basic and enhanced services. BellSouth as a provider of basic telecommunications services falls under Title II of the Communications Act and is subject to common carrier regulation and obligations. ISPs as providers of enhanced services, in contrast, are not regulated under Title II.

The Commission does not regulate enhanced services but ensures a level playing field between BOCs seeking entrance into the ISP market by regulating the ability of the BOC to enter into the market. The *Computer Inquiry* safeguards require that BOC affiliated ISPs acquire all services from the BOC on the same tariff terms and conditions as non-affiliated ISPs. The common carrier requirements of Title II subject all carriers, not only the BOCs to the anti-discrimination provisions in Section 202 of the Communications Act of 1934. Section 202 requires the carrier to provide services to all end users on the same terms and conditions, and further provides that it is not permitted to select who it will and will not provide service to.

In an environment where BellSouth runs to the Commission to "right" every perceived wrong, then appeals the Commission's decision if it does not meet their expectations, the ISPs are left with little hope and a not so remarkable track record on the part of BellSouth, that if this Petition is granted, the ILEC will continue to deal with the independents, simply because "it is in their best interest" to do so.

Competition Within The Broadband Market

Competition with the broadband market as viewed by BellSouth would evidence rapid growth by the cable modem industry between the years of 1999 and December 2003. However, in the FCC's Data Report on High-Speed Services for Internet Access released on June 8, 2004, the opposite is true.¹ In the much coveted residential and small business market, the greatest gains has been made not by the cable industry as BellSouth would had the reader believe, but by the tradition wireline competitors who in December 1999 had a 16.3% market share, but by the same reporting cycle in 2003 had more than doubled their presence in the market to an impressive 34.3%. While the traditional wireline competitors have not made as great advances in the Advanced Service Lines sector of the residential and small business market, they faired slightly better than their competitive counterpart in the cable industry.² The wireline competitors evidenced a 2.3% rise in market share between December 1999 and December 2003, while the cable industry witnessed less than a percentage point (.9%) growth in the same four (4) year period.

In the Petition for Forbearance, BellSouth put forth the argument that in addition to the cable modem, "broadband service can be, and increasingly is being, provided over wireless, satellite, and power-line platforms."³ However, this statement is misleading when compared to FCC data. According to line count data collected between the months of December 1999 and 2003, the market percentage for Satellite or Wireless providers

¹ FCC High-Speed Services Data Report for Internet Access; June 8, 2004. Chart 6 – Residential and Small Business High-Speed Lines ByTechnology.

² Id. Chart 8 - Residential and Small Business High-Speed Lines ByTechnology.

³ BellSouth Petition for Forbearance. WC Docket No. 04-405 at pg. 3.

actually declined from 2.8% to 1.3% - more than a percent and half drop.⁴ Notably absent from the BellSouth Petition is much mention of the CLEC providers of DSL. In December 1999, CLECs were beginning to emerge in the DSL market with a 2.6% presence, however at the same time, four (4) years later in 2003, their market share had diminished to a dismal 1.1%.⁵ Most likely, this decline is due to the *Pro-ILEC/Anti-CLEC* tactics employed by the traditional wireline competitors.

Computer Inquiry Obligations

BellSouth states that “if it is unnecessary to impose the *Computer Inquiry* or Title II obligations on the majority provider in broadband services to ensure just, reasonable, and nondiscriminatory rates and practices, it cannot possibly be the case that it is necessary to impose such obligations upon minority providers.”⁶ However, BellSouth seems to have forgotten two critical items; (1) tradition wireline competitors are not the minority providers of broadband services. As evidenced above, this distinction belongs to the CLECs as well as the Satellite and Wireless providers. (2) The *Computer Inquiry* obligations are necessary today for the same reason they were necessary at their inception – to ensure a level playing field, where the monopolistic nature of the telephone companies cannot consume and destroy the competitive and innovative nature of the broadband market.

When the FCC began the *Computer I Inquiry* in 1971, the Commission was concerned with the possibility of the BOCs entering the advanced services market.⁷

⁴ FCC High-Speed Services Data Report for Internet Access; June 8, 2004. Chart 6 – Residential and Small Business High-Speed Lines By Technology.

⁵ Id.

⁶ BellSouth Petition for Forbearance. WC Docket No. 04-405 at 5.

⁷ *In re Of Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, *Final Decision and Order*, 28 F.C.C. 2d. F.C.C. 2d 267, ¶ 9 (March 18, 1971).

The subsequent *Computer Inquiries* since has evidenced the same concerns with structural separation scheme of *Computer II* and the non-structural separation scheme of *Computer III*. These regulatory schemes protect against improper cost allocations and discrimination by the Bell Operating Companies.

BellSouth is governed by the non-structural separation scheme of *Computer II* and is required to make the underlying transmission facilities available to other ISPs on a non-discriminatory basis.⁸ Furthermore, to insure a level playing field, the *Computer II Inquiry* required the BOC affiliated ISP to purchase the underlying facilities at the same prices, terms, and conditions reflected in their tariffs.⁹ BellSouth would argue that this requirement is antiquated since the *Computer II* Order was rendered in 1980. However, in 2001, anti-competitive behavior towards independent ISPs on the part of BellSouth has been an issue. In 1999, in a Kentucky PSC complaint, Iglou Internet Services, Inc. asserted that BellSouth was charging the independent ISP \$49.95 per month per line, while at the same time charging its affiliate BellSouth.net only \$29.00 per line, per month. As a result of the Iglou complaint, BellSouth was reprimanded by the Kentucky Public Service Commission for having a wholesale tariff that “provided preferential and discriminatory service to itself to the detriment of other customers, specifically the small ISPs”.¹⁰ As recently as August 2004, the Georgia Public Service Commission in response to numerous consumer complaints initiated a generic proceeding to examine BellSouth’s DSL policies.¹¹

⁸ *Computer II*, 77 F.C.C. 2d. at 474-75, ¶ 231.

⁹ *Id.*

¹⁰ *Iglou Internet Services, Inc. v. BellSouth Telecommunications, Inc.* Kentucky PSC. Case No. 99-484 at pg. 11.

¹¹ Georgia Public Service Commission News Release. August 17, 2004.

BellSouth states in its Petition that “no regulatory rule is necessary to ensure independent ISPs access to BellSouth’s network. BellSouth has every incentive to negotiate mutually beneficial network-access arrangements with these companies ... Simply put, BellSouth has a strong economic incentive to maximize the utilization of its broadband capacity. ” If this were truly the case, situations like the Iglou complaint in Kentucky would not have come to light. At issue in the complaint was how BellSouth structured their wholesale tariff to ensure that only the largest market providers, BellSouth.net included, could obtain the largest volume discount. While there may be no dispute that it is in BellSouth’s economic interest to maximize the utilization of its broadband capacity, with no *Computer II* obligations guaranteeing **all** ISPs access on **equal** terms and conditions, BellSouth will be free to deal only with or give preferential treatment to the major players in the broadband industry.

The true intent of BellSouth’s Petition can be found buried deep within the pages of the document itself, and clues the reader into the BellSouth view of entitlement. “If consumers do not need the majority providers to open their lines to independent ISPs in order to ensure just, reasonable, and nondiscriminatory rates and practices, it cannot possibly be the case that it necessary that the minority providers open their lines to ensure the same thing.”¹² This statement is evidence of the “*sincerity*” of BellSouth’s “incentive to negotiate” with independent ISPs for “mutually beneficial network arrangements” as referenced in the previous paragraphs of these Comments.

Title II Common Carrier Requirements

One of the essential characteristics of being a common carrier is that the carrier is subject to the anti-discrimination provisions of Section 202 of the Communications Act

¹² BellSouth Petition for Forbearance at pg. 20.

of 1934.¹³ As a common carrier, BellSouth is required to provide services to all end users on the same terms and conditions and is not permitted to select who it will or will not provide service to.

BellSouth's Petition for Forbearance would be incomplete with simply asking for Forbearance from the *Computer Inquiry* obligations since the anti-discrimination provisions of the Common Carrier requirements impose the same *burden* upon BellSouth. In support of its petition for forbearance from the common carrier requirements, BellSouth states that "this Commission has long concluded that common-carrier obligations should not be imposed in the absence of market power" and therefore, the Commission should forbear from applying Title II common carrier obligations to wireline broadband transmissions.¹⁴

In support of its argument, BellSouth opines that the lack of ILEC market power "means that the market, not regulation, can be trusted to bring benefits to consumers" and that "because ILECs lack market power in broadband transmission, they cannot charge unjust or discriminatory rates." In fact, "[i]f ILECs seeks to do so, consumers will simply choose other facilities-based broadband competitors." BellSouth would like for the reader and the Commission to accept these statements at face value, but when scrutinized by the light of day, they quickly evaporate as the smoke and mirror attempts to refocus the attention elsewhere. In truth, consumers have limited choices as to DSL providers.

BellSouth states that consumers will simply choose other facilities based broadband competitors. This is not always such a simple proposition. In the metropolitan areas, while there may be competition from the cable competitors, the cable

¹³ Communications Act of 1934, Section 202(a).

¹⁴ BellSouth Petition for Forbearance, WC Docket No. 04-405 at 29.

industry is not subject to the *Computer Inquiry* obligations or the Title II common carrier requirements, so with neither of the two (2) major players no longer required to open their networks to independent ISPs – there could potentially only be two competitors .. the ILEC and the cable provider. It is imperative that the *Computer Inquiry* and Title II common carrier obligations remain in place to ensure non-discriminatory access to broadband transmission facilities for competing ISPs and VoIP providers.

While the situation in the metropolitan market is worrisome, the dilemma is bleaker for the rural consumer. The traditional broadband providers have been the ILEC, CLECs, and independent ISPs. The non-traditional providers such as cable, wireless and satellite providers have not yet gained a foothold in most of the rural markets of Kentucky, or nationwide for that matter. Broadband over power-lines while promising, is still in its infancy and is years down the road before it can be considered a viable alternative to ILEC provision of DSL services. If BellSouth's petition is granted, the rural consumer will be faced with higher prices, fewer choices, and slower deployment of broadband into their communities.

Conclusion

The Commission should deny the BellSouth Petition for Forbearance of Application of *Computer Inquiry* and Title II Common Carriage Requirements. The retention of both the *Computer Inquiry* and Title II common carrier requirements is imperative in ensuring the future and protection of consumer choice in broadband market. Without the safeguards of non-discriminatory access to broadband transmission facilities for competing ISPs and VoIP providers, the competitive landscape of the telecommunications market may return to the monopolistic days of old.

